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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOEL D. JOSEPH,

Plaintiff and Appellant,

v.

CVS PHARMACY, INC.,

Defendant and Respondent.

B288641

(Los Angeles County
Super. Ct. No. SC124621)

APPEAL from an order of the Superior Court of
Los Angeles County, Nancy Newman, Judge. Affirmed.

Joel D. Joseph, in pro. per., for Plaintiff and Appellant.

Arnold & Porter Kaye Scholer, Trenton H. Norris, Brian K.
Condon and Jaba Tsitsuashvili for Defendant and Respondent.

INTRODUCTION

Joel D. Joseph, representing himself, brought this action against CVS Pharmacy, Inc. under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) and the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.). The trial court dismissed the action and entered judgment in favor of CVS after sustaining a demurrer to the first amended complaint without leave to amend. Joseph appeals from a postjudgment order awarding CVS attorneys' fees under the CLRA, contending the trial court erred in awarding attorneys' fees and in previously declaring him a vexatious litigant. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Trial Court Declares Joseph a Vexatious Litigant

Joseph filed this action in August 2015, alleging that in June 2015 he purchased from CVS a package of the prescription drug Lipitor that was falsely labeled regarding its country of origin. He alleged that the label indicated the drug was made in the United States, but that in fact the drug was imported.

In March 2016 the trial court granted a motion by CVS to declare Joseph a vexatious litigant and require him to furnish security because of his history of meritless, self-represented litigation. Citing 16 state and federal actions Joseph filed as a self-represented litigant over the previous seven years with final determinations adverse to him, the court found Joseph was a vexatious litigant under Code of Civil Procedure section 391,

subdivision (b)(1).¹ The court also found there was no reasonable probability Joseph would prevail in the action because he did not dispute he saw the allegedly false label on the package of Lipitor only after his purchase and therefore could not demonstrate he relied on any deceptive or improper practice by CVS. (See § 391.1 [motion to have a vexatious litigant furnish security requires a showing “there is not a reasonable probability that he or she will prevail in the litigation”].) The court required Joseph to furnish a \$5,000 bond, which he did.

B. *The Trial Court Enters Judgment in Favor of CVS*

In July 2016 the trial court sustained a demurrer by CVS to Joseph’s complaint, again on the ground Joseph could not allege reliance on any alleged wrong. This time, in addition to stating Joseph did not dispute he purchased the Lipitor before seeing its label, the court observed that in April 2015—two months prior to the purchase at issue in this case—Joseph filed a declaration in another action stating he knew Lipitor was made in Ireland. Although the court believed Joseph would “most likely” be unable to amend his complaint to cure the defect, the court nevertheless gave Joseph leave to try.

And try he did, filing a first amended complaint alleging that he saw the allegedly false label on the drug package before he purchased it, that because of the label he mistakenly believed the drug was made in the United States, and that he would not have purchased the drug had he known it was imported. Again CVS demurred, and again the trial court sustained the demurrer, this time without leave to amend. The court stated it was “not

¹ Undesignated statutory references are to the Code of Civil Procedure.

persuaded” by Joseph’s attempts to “plead around” the previous allegations establishing his lack of reliance and, in particular, his “attempt to plead around his actual knowledge that Lipitor was not made in the United States [was] not well taken.” The court dismissed the action and entered judgment in favor of CVS.

C. *Joseph Unsuccessfully Appeals*

Joseph appealed from the judgment. Because the trial court declared Joseph was a vexatious litigant, however, this court notified Joseph it would dismiss the appeal unless he showed in writing the appeal had merit and was not taken for purposes of harassment or delay. (See § 391.7, subd. (b); *Andrisani v. Hoodack* (1992) 9 Cal.App.4th 279, 281.) When Joseph did not file a timely response to the notice, the court dismissed the appeal. (See § 391.7, subd. (c); *In re Whitaker* (1992) 6 Cal.App.4th 54, 55-57.) Joseph then filed a motion to vacate the dismissal and to reinstate the appeal, arguing the appeal had merit because, among other reasons, the trial court had wrongly declared him a vexatious litigant. After reading and considering the motion and the available record, this court denied the motion, finding Joseph failed to meet his burden of showing the appeal had merit and was not filed for purposes of harassment or delay. The Supreme Court denied Joseph’s petition for review.

D. *The Trial Court Awards CVS Attorneys’ Fees*

CVS then filed in the trial court a motion under sections 391 and 391.3 for release of the \$5,000 security and for attorneys’ fees under the CLRA, which permits a court to award attorneys’ fees to a prevailing defendant upon a finding that “the plaintiff’s

prosecution of the action was not in good faith.” (Civ. Code, § 1780, subd. (e).) The court granted the motion, finding there was “ample evidence that [Joseph’s] action was not brought in good faith; specifically, the court found that there was evidence that [he] was aware of the alleged consumer labeling violation prior to purchasing the prescription drug at issue and was aware or should have been aware [that] he had no standing to sue.” The court released the security to CVS for its costs and attorneys’ fees, but found CVS’s request for \$94,997 in attorneys’ fees was unreasonable. The court awarded CVS \$54,486 in attorneys’ fees, with Joseph to pay the balance remaining after applying the security. Joseph timely appealed.

DISCUSSION

A. *The Trial Court’s Vexatious Litigant Ruling Is Not Reviewable in This Appeal*

Joseph first contends the trial court erred in declaring him a vexatious litigant. We do not address this contention, however, because Joseph could have raised it (as in fact he did) in his appeal from the judgment. (See *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651 [“issues raised by the appeal from the [postjudgment] order must be different from those arising from an appeal from the judgment”]; *Shrewsbury Management, Inc. v. Superior Court* (2019) 32 Cal.App.5th 1213, 1221 [same]; *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1985) 176 Cal.App.3d 480, 487 [in appeal from a postjudgment order, the appellant could not raise issues “that could have been raised on an appeal from the judgment”].) “The reason for this general rule is that to allow the appeal from [an

order raising the same issues as those raised by the judgment] would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment.” (*Lakin*, at p. 651.) Therefore, we do not consider in this appeal Joseph’s argument that the court erred in declaring him a vexatious litigant. (See *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 161 [“[w]e will dismiss that part of the appeal from the postjudgment order” raising issues “embraced in the judgment”].)

B. *The Trial Court Did Not Err in Awarding Attorneys’ Fees*

Joseph also challenges the award of attorneys’ fees, arguing the trial court erred in finding he did not bring the action in good faith. Joseph’s challenge fails.

A decision to award attorneys’ fees to a prevailing defendant under the CLRA “requires the trial court to find that the plaintiff proceeded in subjective bad faith.” (*Shisler v. Sanfer Sports Cars, Inc.* (2008) 167 Cal.App.4th 1, 9; see *Corbett v. Hayward Dodge, Inc.* (2004) 119 Cal.App.4th 915, 924.) Where, as here, the trial court applies the proper test in deciding whether to award such fees, we review that decision for abuse of discretion. (*Corbett*, at p. 927.) A finding of subjective bad faith is a factual determination we review for substantial evidence. (See *Haworth v. Superior Court* (2010) 50 Cal.4th 372, 384 [questions of fact are reviewed for substantial evidence]; *Corbett*, at p. 923 [“courts have explained that good faith, or its absence, involves a factual inquiry into the plaintiff’s subjective state of mind,” italics omitted]; cf. *Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc.* (2015) 236 Cal.App.4th 243, 260

[finding of subjective bad faith required for awarding attorneys' fees under the Uniform Trade Secrets Act "must be upheld if it is supported by substantial evidence"].)

Substantial evidence supported the trial court's bad faith determination. The record shows, and Joseph does not deny, he knew the Lipitor he purchased from CVS was falsely labeled before he purchased it. (See *Corbett v. Hayward Dodge, Inc.*, *supra*, 119 Cal.App.4th at p. 928 [when an "action utterly lacks merit, a court is entitled to infer the party knew it lacked merit yet pursued the action for some ulterior motive"].) Nor does he deny making sham allegations in the first amended complaint to plead around his initial, fatal allegation that he saw the label on the Lipitor package only after he purchased it. (See *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1248 ["a plaintiff cannot avoid allegations that are determinative to a cause of action simply by filing an amended complaint which omits the problematic facts or pleads facts inconsistent with those alleged in the original complaint"]; *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425, 426 [""to prevent an abuse of process,"" "plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers"].) The trial court did not abuse its discretion in granting the motion for attorneys' fees.

DISPOSITION

The order granting the motion by CVS for attorneys' fees is affirmed. CVS is to recover its costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.